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No. 86-1549

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CONSUL, LTD.,

Petitioner,

v.

TRANSCO ENERGY COMPANY, formerly known as TRANSCO COMPANIES, INC., and TRANSCONTINENTAL GAS PIPE LINE CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF OF PETITIONER

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ARGUMENT

1. Transco's Use Of Its Strategic Dominance In Transportation To Exclude Competition In Other Lines Of Business Continues Regardless Of Vastly Changed Conditions In Markets For Natural Gas

Transco, in the second paragraph on page 2 of its brief in opposition, alleges a number of undocumented changes that have occurred in the natural gas industry since the events which gave rise to this suit took place in 1978. The facts are true insofar as they go,

but Transco omits other important facts which refute its assertion that the violation charged "does not address current conditions in the natural gas industry, nor can it have any broad interest." The fact is that Transco's use of its strategic dominance in transportation to exclude competition in the product market for gas continues to this day, to the continuing injury of plaintiff as alleged in its original complaint.

We have no wish to enlarge the record, but since Transco's argument is predicated on developments since the record was closed, we call attention to publicly available sources that provide factual information abut the period to which Transco refers, primarily the recent book by Arlon R. Tussing and Connie C. Barlow, *The Natural Gas Industry: Evolution, Structure and Economics* (1984) (hereafter "Tussing & Barlow").

Key facts which Transco omits from its recital include the following:

(1) The glut of excess gas that emerged in the 1980s did not result in depressing prices, as would be the normal expectation in conditions of glut. This was a glut of high priced gas, the result of Transco—and other interstate pipelines—buying more high priced gas than they were able to sell. At the same time, while regulation of prices at the wellhead was largely deregulated by the NGPA of 1978, regulation of transportation continued. (Tussing & Barlow, p. 218) Under that regulation, Transco is required to average the cost of all the gas in its system and sell at that average price. This resulted in an increasing price level that in many cases made gas no longer competitive with other fuels. (Tussing & Barlow, pp. 117, 171-78, 217-18)

(2) Other sources of natural gas, not locked into Transco's high average cost of gas, were available to meet the needs of industrial end users who could use this cheaper gas but not Transco's higher priced gas. (Tussing & Barlow, p. 217)

(3) The result has been a tiered pricing situation in which transportation has been sought for lower cost sources of gas needed by end users who cannot afford the higher priced gas offered by the pipelines; but who encounter resistance on the part of the pipelines to transport the competitive cheaper gas. This situation is not limited to Transco. The situation is described by Tussing & Barlow as follows:

> "The self-help program of the 1970s may have set in motion forces that ultimately will transform the gas and transmission business. For the first time since the interstate market arose, users and producers were directly in contact. Even after the shortages disappeared, the gas surplus of the 1980s rekindled self-help transactions. This time, industrial customers were shopping around for gas that would cost *less* (including transportation charges) than gas purchased from an interstate carrier." p. 217 (emphasis in original).

The same authors also make clear that Transco's refusal to transport is not unique:

> "Increasingly, interstate pipeline companies are having to reckon with a future that could strip them of a traditionally central and aggressive role in gas industry transactions. Some are fighting the winds of change by

> making it very difficult for third parties to utilize their facilities on a contract basis." *Ibid.*

It has been largely in response to this situation that FERC has been attempting to work out transportation arrangements on a voluntary basis under its Order 436, referred to both in the Petition and Transco's brief. But this program remains voluntary, with no prospect of its becoming manditory because FERC lacks the authority to make it so.

Two further points should be noted in response to Transco's contention that changed conditions make the issue presented by this case not relevant to present conditions. One is that the only historically unique circumstance that cannot be expected to recur is the change from a regulated to a deregulated wellhead price. The only impact that development had on this case, however, went to a question of damages which is not in issue on this petition.

The second point is that the major change that has occurred—from shortage to surplus—is not expected to be permanent. Both Transco's CEO, W.J. Jack Bowen, and plaintiff's expert witness describe the surplus as temporary and likely to be followed by a future period of shortage. (.J.R. pp. 2478-79; 1411). A recent article in the *Oil and Gas Journal* predicts an end to the surplus by 1988 (Nov. 24, 1986, p. 31).

2. The Fourth Circuit's Decision Is Not Distinguishable From The Fifth Circuit's Contrary Decision In *Woods v. Alcoa*

In both cases the alleged violation consisted of anticompetitive behavior related to a single natural gas producing field, and in each case the defendant sought

to escape liability on the ground that a single field of natural gas was too narrow to constitute a relevant market. In *Woods Exploration and Production Co. v. Aluminum Co. of America*, 438 F.2d 1286 (CA5 1971), *cert. denied*, 404 U.S. 1047 (1972) there was no special interrogatory to the jury as to the existence of a relevant market, as there was in the instant case. The trial judge in *Woods* entered a judgment n.o.v. against the plaintiff on the ground, as the Fourth Circuit ruled here, that the single natural gas field could not be a relevant market, and the Fifth Circuit reversed the ruling. The jury in this case specifically found that relevant markets had been proved with respect to two fields of natural gas. We submit that the Fourth Circuit's overriding of the jury verdict on the ground that these fields were part of a larger market cannot be reconciled with *Woods v. Alcoa*.

Transco protests our quotation from an earlier Fourth Circuit decision rejecting the concept of relevant sub-markets on the ground that it was a different case. *Satellite Television & Associated Resources, Inc. v. Continental Cablevision of Virginia, Inc.*, 714 F.2d 351 (CA4 1983), *cert. denied*, 465 U.S. 1027 (1984) (hereafter "*STAR*"). But the Fourth Circuit cited that precedent in its opinion below (Pet. App. p. 12a, 805 F.2d at 495), and the logic of its ruling reflects the same rejection of the concept of a relevant sub-market that it expressed earlier in *STAR*.

3. The "National Market" For Natural Gas Proclaimed By FERC To Have Emerged In 1985 Did Not Exist In 1978, And Has No Assured Future

Although Transco injects a reference by FERC to a "national market" for natural gas in the context of changed conditions in the industry, and not in the

context of the relevant markets, the language so clearly parallels that of the Court of Appeals on that subject that the distinction should be emphasized. We stated in our petition that the "national market" for natural gas referred to by the Court of Appeals did not exist. This was in the context of the time frame included by the record of this case which was 1978-1979.

Since then, as a condition of shortage turned into glut it became practical to use techniques for the purchase and sale of gas between two points even though the gas owned by the seller cannot be physically transported to the location of the buyer. (50 Fed. Reg. 42,413 (Oct. 18, 1985) This is what is meant by the language quoted from FERC that "a given supply of the natural gas commodity can now be transported—by front haul, back haul, exchange or displacement—to points throughout the continental United States." (Transco brief p. 5). Under the shortage conditions of 1978 this was not a significant possibility because there were no excess supplies that could be utilized to make such techniques workable as a means of alleviating the shortage.

Moreover, the extent to which such transactions that transcend the limits of a given pipeline system are likely to continue is highly problematical. Tussing and Barlow, *supra*, note that:

> "Wherever possible they [interstate pipelines] tried to sell gas *off system* to other pipelines that had not yet encountered the limits of customer demand. But by the time regulatory obstacles to off-system sales were overcome, the gas glut had infected the entire nation, and there were no re-

gional shortfalls left to fill." p. 173 (emphasis in original).

The FERC statement about a "national market" therefore has no bearing in support of the Fourth Circuit's reliance on that concept to reject the jury's findings as to relevant markets. The concept appears nowhere in the record of the trial and appeal, Transco's argument having been that the gas producers had alternatives to selling their gas to Transco. But the jury also heard evidence that any such alternatives would have required the construction of a new pipeline and that no plans were in place to do so. (J.R. pp. 1926-30)

With respect to the context in which Transco uses the FERC quotation, as an illustration of changed conditions in the industry, it should be pointed out that this national market can work only if transportation is available, and, as indicated above, availability of transportation remains a problem. FERC noted in its 1985 comments quoted from in Transco's brief that "There are some geographic areas where there is but a single pipeline supplier" (50 Fed.Reg. 42,412 Oct. 18, 1985), and further that the availability of supplies on a national basis is contingent upon "non-discriminatory access to the transportation service and proper rate treatment for all pipelines" (*Id.* at 42,413). The fact that transportation is a continuing problem on a national scale is a matter of public record in the ongoing FERC proceedings regarding Order 436.

CONCLUSION

What is at issue in this case is not an idiosyncratic set of facts that are now history, but the ongoing behavior of Transco systematically to employ monop-

olistic practices to exclude competition in product markets for natural gas. Moreover, for Transco to escape responsibility for its singularly outrageous conduct in the shortage conditions of 1978 would send a message not only to Transco but to all interstate pipeline systems that they need not concern themselves about the antitrust laws should they choose to manipulate the vast power of their pipelines to exclude unwelcome competition.

Respectfully submitted,

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